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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

7 RICKIE H. DAVIS,)

8 Plaintiff,)

9 v.)

10 JO ANNE B. BARNHART,)
Commissioner of Social Security,)

11 Defendant.)
12)

CASE NO. C05-1951-JLR-MJB

REPORT AND
RECOMMENDATION

13 Plaintiff Rickie H. Davis ("Plaintiff") appeals to the District Court from a final decision of
14 the Commissioner of the Social Security Administration (the "Commissioner") denying his
15 application for Disability Insurance Benefits ("DIB") under Title II of the Social Security Act.
16 42 U.S.C. §§ 401-33 (2003). For the reasons set forth below, it is recommended that the
17 Commissioner's decision be AFFIRMED.

18 I. PROCEDURAL HISTORY

19 Plaintiff filed his application for DIB in June 30, 2000, claiming he became disabled
20 beginning April 13, 1995 (Tr. 96-98) due to constant pain in his legs and back from lower lumbar
21 injuries and due to illiteracy (Tr. 171). Plaintiff subsequently amended his disability onset date to
22 January 1, 1998. Tr. 34, 575. Plaintiff's application was denied initially (Tr. 70) and on
23 reconsideration (Tr. 75), after which he requested a hearing with an Administrative Law Judge
24 ("ALJ") (Tr. 78). Plaintiff testified and was represented by counsel at a November 4, 2002

1 hearing before ALJ Krainess. Tr. 30-60. A vocational expert (“VE”), William Weiss, also
2 testified. Tr. 52-60. The ALJ issued his decision finding Plaintiff not disabled on January 17,
3 2003. Tr. 17-29. The Appeals Council declined to review ALJ Krainess’ decision on May 2,
4 2003 (Tr. 8-10), and Plaintiff filed a complaint for judicial review with this court. This Court
5 remanded the case for further administrative proceedings on November 3, 2003, instructing the
6 ALJ to specify whether Plaintiff meets the regulatory definition of illiteracy and to consult a
7 medical expert (“ME”) regarding the nature and severity of Plaintiff’s orthopedic impairments.
8 Tr. 533-34. The Appeals Council remanded the case consistent with this Court’s order on
9 December 19, 2003. Tr. 537-38.

10 On April 25, 2005, ALJ Nichols presided at Plaintiff’s second hearing. Tr. 573-620.
11 Plaintiff was represented by counsel and testified on his own behalf. Tr. 580-99. Plaintiff’s
12 second hearing also included testimony from his wife, Donnelle Davis (Tr. 600-07), ME Dr.
13 Jacqueline Farwell (Tr. 608-11), and VE Judith Parker (Tr. 612-16). The ALJ found Plaintiff
14 not disabled and denied benefits on June 1, 2005. Tr. 501-12. The Appeals Council declined to
15 review the case, making the June 2005 decision the final decision of the Commissioner. Tr. 497;
16 20 C.F.R. § 404.984(b)(2) (2006). Plaintiff filed his appeal for review by this Court on
17 November 17, 2005.

18 II. THE PARTIES’ POSITIONS

19 Plaintiff requests that the Court reverse the ALJ Nichols’ finding that Plaintiff is not
20 disabled and order payment of benefits. He argues that ALJ Nichols should have concluded that
21 Plaintiff could only perform sedentary work, consistent with ALJ Krainess’ previous finding, and
22 that ALJ Nichols should have found Plaintiff disabled based on his illiteracy at step five.

23 The Commissioner argues that ALJ Nichols applied correct legal standards and cited
24 substantial evidence, and his finding that Plaintiff is not disabled should therefore be affirmed.

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III. STANDARD OF REVIEW

This Court may set aside the Commissioner's denial of DIB when an ALJ's findings are based on legal error or are not supported by substantial evidence in the record as a whole. *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence is defined as more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Rather than affirming the Commissioner's decision by isolating a specific quantum of supporting evidence, the Court must consider the record as a whole and weigh evidence that supports and evidence that detracts from the Secretary's conclusion. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). Where the evidence is susceptible to more than one rational interpretation, it is the Commissioner's conclusion which must be upheld. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982).

IV. EVALUATING DISABILITY

Claimants bear the burden of proving that they are disabled. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). Disability is defined as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment, which can be expected to result in death, or which has lasted or can be expected to last for a continuous period of not less than twelve months. 42 U.S.C. § 423 (d)(1)(A).

The Social Security regulations set out a five-step sequential evaluation process for determining whether claimants are disabled within the meaning of the Social Security Act. *See* 20 C.F.R. § 416.920. At step one, a claimant must establish that he or she is not engaging in any substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b). At step two, a claimant must

1 establish that he or she has one or more medically severe impairments or combination of
2 impairments. If a claimant does not have a “severe” impairment, he or she is not disabled. *Id.* at
3 § (c). At step three, the Commissioner will determine whether the claimant’s impairment meets
4 or equals any of the listed impairments described in the regulations. A claimant who meets one
5 of the listings is disabled, *see Id.* at § (d). If a claimant’s impairments do not meet or equal a
6 listing, the Commissioner proceeds to step four.

7 At step four, the Commissioner evaluates the claimant’s residual functional capacity and
8 the physical and mental demands of the claimant’s past relevant work to determine whether the
9 claimant is able to perform his or her past relevant work. *Id.* at § (e). If a claimant is not able to
10 perform his or her past relevant work, the burden shifts to the Commissioner at step five to show
11 that the claimant can perform some other work that exists in significant numbers in the national
12 economy, taking into consideration the claimant’s residual functional capacity, age, education,
13 and work experience. *Id.* at § (f); *Tackett*, 180 F.3d at 1100. If the Commissioner finds that the
14 claimant is unable to perform other work, then the claimant is disabled.

15 V. SUMMARY OF THE RECORD EVIDENCE

16 Because the parties have adequately summarized the record in their briefing, and because
17 much of the record evidence is not relevant given the scope of the issues, the Court will not
18 summarize the record here. Relevant evidence will be referenced in the discussion as necessary.

19 Born in 1956 (Tr. 96), Plaintiff was 41 years old at the onset of his alleged disability on
20 January 1, 1998 (Tr. 575); 44 years old when he filed his DIB application on June 30, 2000 (Tr.
21 96); and 46 years old when his disability insurance status expired on December 31, 2002 (Tr.
22 576). Plaintiff is a high school graduate with past relevant work as a fishnet stringer, shellfish
23 grower, wharf laborer, valet and parking lot attendant, rope laying machine operator, and
24 construction worker. Tr. 505-06, 612.

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VI. THE ALJ'S DECISION

At step one, ALJ Nichols found the Plaintiff was not engaged in substantial gainful activity. Tr. 511, Finding No. 1. At step two, the ALJ found that Plaintiff's back problems after his surgeries, his illiteracy, and his mild depression were severe impairments. Tr. 511, Finding No. 3. At step three, the ALJ found that Plaintiff's impairments did not meet or equal a listed impairment. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1; Tr. 511, Finding No. 4. The ALJ determined that Plaintiff retains a residual functional capacity ("RFC") which allows him to frequently lift or carry 10-15 pounds, stand or walk about six hours in an eight-hour workday, and sit about six hours in an eight-hour workday. Tr. 511, Finding No. 6. The ALJ also found that Plaintiff has a limited range of motion; that he should periodically alternate between sitting and standing; and that he should avoid bending, walking over rough or uneven terrain, and climbing ramps, stairs, ladders, ropes, and scaffolds. *Id.* Finally, the ALJ found that Plaintiff has a third grade reading ability and a fifth grade mathematic ability. *Id.* At step four, the ALJ determined that Plaintiff could perform his past relevant work as a valet and parking attendant, and that he is therefore not disabled. Tr. 511, Finding No. 8.

VII. DISCUSSION

Plaintiff's central argument is that, based on his illiteracy, he should have been found disabled by application of the Medical-Vocational Guidelines (the "grids") at step five. Here, however, the ALJ found that Plaintiff is not disabled at step four. Therefore, this Court's review initially focuses on whether ALJ Nichols' step four finding is free of legal error and supported by substantial evidence. Because the Court concludes that the ALJ's step four analysis was not in error, the Court does not address Plaintiff's step five arguments.

A. Issues on Remand

Plaintiff claims that the ALJ improperly dismissed his claim at step four by finding that he

1 is capable of performing light work and that he can perform his past relevant work as a valet and
2 parking attendant. He argues that ALJ Nichols should have found him only capable of
3 performing sedentary work, thereby maintaining consistency with ALJ Krainess' finding at
4 Plaintiff's previous hearing and with assessments from evaluating doctors.¹ Plaintiff argues that
5 because ALJ Nichols adopted the prior analysis and credibility findings reached by ALJ Krainess,
6 he should have moved on to step five and found Plaintiff disabled by applying the grids. Plaintiff
7 asserts that ALJ Nichols chose to substitute a higher level of exertional capacity at step four in
8 order to avoid application of the grids.

9 The Commissioner responds that ALJ Nichols was not required to adopt ALJ Krainess'
10 conclusion that Plaintiff is limited to sedentary work because ALJ Krainess' decision was vacated
11 when the Appeals Council remanded the case consistent with the Order of this Court. Tr. 537.
12 The Commissioner argues that, pursuant to this Court's Order, ALJ Nichols determined whether
13 Plaintiff meets the regulatory definition of illiteracy and consulted an ME regarding the nature
14 and severity of his orthopedic impairments. Tr. 533.

15 The record supports the Commissioner's arguments. The Appeals Council vacated the
16 previous decision by ALJ Krainess on remand; therefore, the final decision for review by this
17 Court is the decision of ALJ Nichols. Tr. 537. Although ALJ Nichols reached a different
18 conclusion than ALJ Krainess as to Plaintiff's RFC and his ability to perform his past relevant
19 work, ALJ Nichols reached his conclusion in the course of fulfilling his obligations on remand, as
20 directed by this Court.

21 In his opinion, ALJ Nichols expressly adopted ALJ Krainess' analysis and findings

22 ¹ Plaintiff also argues that ALJ Nichols' opinion was inconsistent with the Washington
23 State Department of Labor and Industries' ("L & I") finding that Plaintiff is totally disabled.
24 However, L & I found Plaintiff disabled based on its assessment of his illiteracy (Tr. 471-82),
25 which ALJ Nichols accepted as correct and adopted as Plaintiff's non-exertional limitation (Tr.
26 509, 511, Finding No. 6).

1 regarding all issues except for those he was charged with considering on remand: 1) Plaintiff's
2 alleged illiteracy and 2) the nature and severity of his orthopedic impairments. Tr. 504. Both
3 issues impact an evaluation of Plaintiff's RFC at step four, and if the ALJ had reached step five,
4 Plaintiff's illiteracy would also pertain to a step five application of the grids. Both issues were
5 therefore critical to making a final determination of disability in Plaintiff's case. There was
6 nothing in the Court's Order of Remand that precluded ALJ Nichols from independently
7 evaluating Plaintiff's RFC after consulting an ME at the hearing or from evaluating the medical
8 record and newly submitted medical evidence based on what he learned from the ME. Tr. 533-
9 34. The Remand Order states that, in addition to making a literacy determination and consulting
10 an ME, the ALJ will perform any further development deemed necessary and may raise and
11 pursue additional issues. Tr. 533. In addition, the Appeals Council remanded the case consistent
12 with this Court's Order, giving ALJ Nichols the authority to take any additional actions not
13 inconsistent with that Order. Tr. 537-38; 20 C.F.R. § 404.977(b) (2006).² The Court therefore
14 concludes that ALJ Nichols' finding that Plaintiff could perform light work is not in error for
15 being different from that of ALJ Krainess.

16 B. ALJ Nichols' Analysis of Remanded Issues

17 1. Plaintiff's Illiteracy

18 Plaintiff argues that his illiteracy was not properly taken into account, but the record
19 reflects that, as directed by this Court on remand, ALJ Nichols made a determination as to
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21 ² Other Circuits have understood 20 C.F.R. § 404.977(b) to mean that ALJs are not
22 constrained to make the same findings on remand as long as their findings are not inconsistent
23 with the Appeal's Council's remand order. *See Houston v. Sullivan*, 895 F.2d 1012, 1015 (5th
24 Cir. 1989) (acknowledging that when a case is remanded for an ALJ to gather additional
25 information, the ALJ is free to reevaluate the facts); *see also Campbell v. Bowen*, 833 F.2d 1518,
26 1521-22 (10th Cir. 1989) (recognizing an ALJ's authority to make any determination not
inconsistent with the terms of the Appeals Council's remand).

1 Plaintiff's illiteracy.

2 Under disability evaluation regulations, "illiteracy means the inability to read or write," as
3 evidenced by an inability to "read or write a simple message such as instructions or inventory lists
4 even though the person can sign his or her name." 20 C.F.R. 404 § 1564(b)(1).

5 In his opinion, ALJ Nichols adopted Plaintiff's illiteracy as his non-exertional limitation.
6 Tr. 510. The ALJ stated that he had no reason to doubt a 1998 vocational evaluation of
7 Plaintiff's reading and math skills completed by TRIAD Rehabilitation Solutions, which
8 concluded that Plaintiff's reading ability is at a third grade level and that his mathematics ability is
9 at a fifth grade level. Tr. 510, 474. Additionally, during Plaintiff's hearing, he and his wife
10 testified that Plaintiff was unable to take down a simple message, read a shopping list, or write
11 checks from a checkbook. Tr. 584-87, 600-02. Plaintiff testified that he was able to graduate
12 from high school due to his involvement in sports and his enrollment in special education classes.
13 Tr. 580-81. Accordingly, the ALJ found that Plaintiff possesses third grade reading skills and
14 fifth grade mathematics skills. Tr. 511, Finding No. 6. The ALJ has therefore fulfilled his duty
15 on remand to make a determination regarding Plaintiff's illiteracy.

16 2. Plaintiff's Orthopedic Impairments

17 As directed by this Court on remand, ALJ Nichols consulted an ME, Dr. Farwell,
18 regarding Plaintiff's orthopedic impairments. Dr. Farwell testified that objective medical
19 evidence did not support the degree of symptoms reported by Plaintiff. Tr. 608. Dr. Farwell
20 also refuted a 2004 assessment of Plaintiff by Dr. Mark Heilbrunn, in which Dr. Heilbrunn opined
21 that Plaintiff could carry three pounds, sit for a total of four hours with periods of postural
22 repositioning, and stand or walk for 15-20 minutes. Tr. 609-10, 571.

23 Plaintiff does not claim that ALJ Nichols improperly evaluated the medical evidence in
24 this case. Instead, in order to demonstrate the *inconsistency* of ALJ Nichols' opinion, he asserts

1 that Dr. Heilbrunn's opinion was consistent with ALJ Krainess' opinion. Plaintiff also calls Dr.
2 Farwell's opinion a "maverick opinion" and claims it is entitled to little persuasive weight
3 because it is inconsistent with numerous prior medical opinions. However, it is the ALJ's
4 responsibility to assign weight and credibility to witness's testimony. *Andrews*, 53 F.3d at 1039.
5 In addition, this Court has already concluded, *supra* at subsection A, that ALJ Nichols' findings
6 need not be consistent with ALJ Krainess' findings given ALJ Nichols' obligations on remand.

7 Although Plaintiff does not claim ALJ Nichols improperly evaluated medical evidence,
8 the Commissioner nonetheless argues that ALJ Nichols relied on substantial evidence in the
9 record to reach his conclusion that Plaintiff could perform light work. The Court notes that the
10 record supports the Commissioner's argument.

11 An ALJ may reject treating and examining physicians' opinions if he or she presents clear
12 and convincing reasons for doing so. *Matthews v. Shalala*, 10 F.3d 678, 680 (9th Cir. 1993); *see*
13 *also, e.g., Lester v. Chater*, 81 F.3d 821, 830-831 (9th Cir. 1995). These reasons must be based
14 on substantial evidence in the record. *Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir. 1987).
15 Here, the ALJ concluded that the record contains no valid physicians' opinions indicating that
16 Plaintiff is disabled or limited beyond what ALJ Nichols concluded. Tr. 508. In reaching his
17 conclusion, ALJ Nichols provided clear and convincing reasons based on substantial evidence in
18 the record.

19 First, ALJ Nichols gave no weight to a physical capacity evaluation performed in 1996
20 that assigned Plaintiff a sedentary RFC because it presented no objective findings and because
21 Plaintiff was working at a *medium* RFC job at the time. Tr. 509. The record supports the
22 conclusion that the evaluation was based on Plaintiff's subjective report of symptoms rather than
23 objective findings (Tr. 277-79), and that Plaintiff was working at an Oyster Hatchery when the
24 evaluation took place (Tr. 194, 200). An evaluation in 2000 also assigned Plaintiff with a

1 sedentary RFC, which the ALJ rejected because Plaintiff declined to try many of the movements
2 (Tr. 432), gave very little effort, and the resulting demonstration of poor body mechanics directly
3 contradicted a previous demonstration of excellent body mechanics (Tr. 366). Tr. 509. The ALJ
4 interpreted the evaluation results as indicative that Plaintiff was “simply not trying” and based
5 this interpretation on his finding that Plaintiff was not entirely credible. Tr. 508, 509, 511,
6 Finding No. 5. Plaintiff does not challenge ALJ Nichols’ credibility finding.

7 Second, ALJ Nichols attached little weight to opinions from Dr. Kazymyra, Dr.
8 Heilbrunn, and Dr. Allan. Tr. 509. Dr. Kazymyra opined that Plaintiff was severely limited and
9 unable to lift two pounds or to stand and walk (Tr. 349), but this severe opinion is not supported
10 by objective treatment notes or other medical evidence in the record. The ALJ attributed little
11 weight to Dr. Heilbrunn’s physical evaluation (Tr. 563-572), finding it conclusory, inconsistent,
12 and not useful for determining disability because it focused on Plaintiff’s status at the time of the
13 evaluation (August 2004) rather than the time through which Plaintiff was insured (December
14 2002). Tr. 509. The ALJ’s conclusion is supported by the ME’s testimony, which criticized Dr.
15 Heilbrunn’s evaluation for its use of unconventional or inaccurate measurements to assess
16 Plaintiff’s abilities and for being inconsistent with other medical evidence. Tr. 609-10. The ALJ
17 also rejected Dr. Allan’s physical capacities evaluation, which indicated that Plaintiff could not
18 work more than six hours per day (Tr. 495) because it was not based on any physical tests; it was
19 without foundation and not accompanied by an explanation; and it was inconsistent. Tr. 509.
20 The record supports the ALJ’s conclusion that the limitations indicated in Dr. Allen’s physical
21 capacities evaluation was inconsistent and without basis or explanation. Two weeks prior to his
22 physical capacities evaluation, Dr. Allen indicated in his treatment notes that Plaintiff was “doing
23 pretty well most of the time” except for flare ups “every once in a while” (Tr. 492).

24 Finally, the ALJ gave considerable weight to the opinion of Dr. Damon, who opined that,


1 despite Plaintiff's embellishments and symptom magnification, he could perform light work with
2 position changes as needed. Tr. 508, 445-46. The ALJ also relied on testimony from the ME
3 and the VE. Tr. 509-10. The ME testified that, based on her review of Plaintiff's medical
4 records, Plaintiff is capable of lifting 50 pounds occasionally and 20 pounds frequently, and that
5 his back is stable. Tr. 610. The VE testified that Plaintiff could return to his past relevant work
6 as a valet and parking attendant as previously performed and as generally performed in the
7 national economy. Tr. 614.

8 In summary, the ALJ articulated clear and convincing reasons based on substantial
9 evidence in the record for rejecting opinions and assessments from several physicians and for
10 relying on other physicians' and experts' opinions. Accordingly, I conclude that the ALJ did not
11 err in finding at step four of the sequential evaluation process that Plaintiff could perform light
12 work and could work as a valet and parking attendant.

13 VIII. CONCLUSION

14 The Commissioner's determination to deny Plaintiff benefits is free of legal error and is
15 supported by substantial evidence. Based on the record evidence, the undersigned recommends
16 that the Commissioner's decision be AFFIRMED. A proposed Order accompanies this Report
17 and Recommendation.

18 DATED this 7th day of August, 2006.

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21 MONICA J. BENTON
22 United States Magistrate Judge
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